SYARIKAT MOHD NOOR YUSOF SDN BHD

v.

POLIBINA ENGINEERING ENTERPRISE SDN BHD

COURT OF APPEAL, PUTRAJAYA
DENIS ONG JCA
MOHD GHAZALI YUSOFF JCA
ARIFIN JAKA JCA
[CIVIL APPEAL NO: T-02-830-1999]
27 JANUARY 2005

COMPANY LAW: *Winding up - Petition - Appeal against - Debt, whether disputable - Whether appellant insolvent - Notice issued under s. 218 Companies Act 1965 - Whether a judgment sum - Issues to be determined - Whether respondent should have resorted to arbitration - Whether just and equitable for appellant to be wound up*

The appellant (main contractor) entered into building contracts with the respondent (main sub-contractor). Subsequently, the respondent sent a notice under s. 218(2)(a) of the Companies Act 1965 to the appellant for an alleged debt totaling RM896,378.18. Upon the appellant's failure to pay the said amount, the respondent filed a petition in the High Court to wind up the appellant on the ground that it was insolvent and unable to pay its debt. The High Court allowed the petition and ordered that the appellant be wound up. Dissatisfied, the appellant appealed.

Held (allowing the appeal)
Per Mohd Ghazali Yusoff JCA:

[1] The presumption that the appellant was unable to pay its debts did not arise as the appellant was still solvent. The indebtedness was clearly disputed and the sum referred to in the respondent's notice issued under s. 218(2) was not a judgment sum. That notice was nothing more than a letter of demand sent by the respondent's solicitors, the purpose of which was to invoke the presumption of inability to pay debts. The respondent still had to prove that it was a creditor and the sum so stated in the notice was owed and due. (pp 686 h-i & 687 a)

[2] One of the issues to be determined was whether it was the respondent and not other sub-contractors who completed the work of the building contract, and consequently whether the appellant paid directly to the respondent or to the sub-contractors for work done. The respondent had not exhausted all remedies available to it as provided for under the said contracts. The dispute should be referred to the superintending officer or to arbitration as the case may be provided for under the said contracts. This was not a proper case to grant an order of winding up. (p 687 d-f)

[High Court judge's order of winding up granted against appellant set aside; deposit be refunded to appellant.]

*[**Bahasa Malaysia** Translation Of Headnotes*

Perayu (kontraktor utama) telah memeterai beberapa kontrak bangunan dengan responden (sub-kontraktor utama). Berikutnya, responden menghantar notis di bawah s. 218(2)(a) Akta Syarikat 1965 kepada perayu berdasarkan kepada suatu hutang yang dikatakan tertunggak berjumlah RM896,378.18. Ekoran kegagalan perayu membayar jumlah yang dituntut, responden memfail petisyen di Mahkamah Tinggi bagi menggulung perayu atas alasan bahawa perayu sudah insolven dan tiada kemampuan untuk membayar hutang-hutangnya. Mahkamah Tinggi membenarkan petisyen sekaligus memerintahkan supaya perayu digulung. Tidak berpuas hati, perayu merayu.

Diputuskan (membenarkan rayuan)
Oleh Mohd Ghazali Yusoff HMR:

[1] Anggapan bahawa perayu tidak mampu untuk membayar hutangnya tidak berbangkit oleh kerana perayu masih lagi solven. Soal keberhutangan jelas telah dipertikaikan dan jumlah yang tertera pada notis responden yang dikeluarkan di bawah s. 218(2) bukanlah suatu jumlah penghakiman. Notis tersebut tidak lebih dari suatu surat tuntutan yang dihantar oleh peguam responden, guna membangkitkan anggapan ketiadaan kemampuan untuk membayar hutang. Responden masih perlu membuktikan bahawa ia adalah seorang pemiutang dan jumlah yang tertera pada notis sememangnya terhutang dan tertunggak.

[2] Salah satu dari isu yang perlu diputuskan adalah sama ada respondenlah, dan bukan lain-lain sub-kontraktor, yang sebenarnya telah menyiapkan kerja-kerja kontrak bangunan, dan dengan itu, sama ada perayu telah membayar secara terus kepada responden ataupun kepada sub-kontraktor lain untuk kerja-kerja yang disempurnakan. Responden tidak menghabiskan kesemua remedi-remedi yang ada seperti yang dikehendaki oleh kontrak-

kontrak berkenaan. Pertikaian sepatutnya dirujuk kepada pegawai penguasa atau kepada timbang tara menurut peruntukan kontrak-kontrak berkenaan. Ini bukanlah suatu kes yang wajar bagi penggulungan.

Perintah penggulungan hakim Mahkamah Tinggi terhadap perayu diketepikan; deposit dikembalikan kepada perayu.]

Case(s) referred to:

In re Ban Hong Co Ltd [1959] MLJ 100 ***(refd)***

Jurupakat Sdn Bhd v. Kumpulan Good Earth (1973) Sdn Bhd [1988] 1 CLJ 649; [1988] 1 CLJ (Rep) 618 HC ***(refd)***

Sri Hartamas Development Sdn Bhd v. MBf Finance Bhd [1992] 1 CLJ 637; [1992] 1 CLJ (Rep) 303 SC ***(refd)***

Legislation referred to:

Companies Act 1965, ss. 218(2)(a), 283

Rules of the High Court 1980, O. 18 r. 19

For the appellant - Bastion Vendargon; M/s Vendargon & Partners

For the respondent - Harcharan Singh; M/s Harcharan S Sidhu & Assoc

[Appeal from High Court, Kuala Terengganu; Companies Winding-Up No: 28-18-1998]

Reported by Suhainah Wahiduddin

JUDGMENT

Mohd Ghazali Yusoff JCA:

On 18 November 1998 the respondent in liquidation filed a petition in the High Court, Kuala Terengganu to wind-up the appellant. It would be appropriate to mention here that respondent was wound up by the High Court, Kuala Lumpur on 20 January 1997, *viz.*, prior to the filing of the petition to wind-up the appellant.

On 16 October 1999 the High Court, Kuala Terengganu ordered that the appellant be wound up, that one Tee Siew Kai be appointed liquidator and that the respondent be allowed the costs of the petition to be paid by the liquidator out of the assets of the appellant. Against that decision the appellant appealed. We had on 14 September 2004 allowed the appeal with costs and set aside the order of winding up made against the appellant and we now give our reasons.

The petition showed that the appellant's authorised capital is 10 million ordinary shares of RM1 each and its paid-up capital is RM8,395,902. The respondent alleged that the appellant is indebted to its goodself in the sum of RM896,378.18 ("the said sum") under three (3) certificates for progress payments and a certificate for final payment for work done.

The facts showed that the appellant entered into two building contracts ("the said contracts") with the respondent to build shop-houses, dated 28 September 1994 and terrace-houses, dated 15 October 1994 (hereafter referred to as "the works"). The appellant was the contractor for the works and appointed the respondent as the main sub-contractor. The petition, *inter alia*, reads:

> 5. The Company is indebted to your Petitioner in the sum of RM896,378.18 being the amount due on Certificates of Progress Payment Nos. 31, 32, and 33 in respect of the project known as "Cadangan Pembangunan 572 Unit Rumah Teres Satu Tingkat Kos Rendah Fasa 1 hingga Fasa V di Kampung Fikri Mukim Chukai Kemaman, Terengganu Darul Iman" and Certificate for Final Payment in respect of the project for the construction and completion of 105 units of double storey shop lots erected on Lot 5626 Mukim Chukai Kemaman Terengganu Darul Iman (hereinafter referred to as "the Indebtedness"). A copy of the said certificates are annexed herewith and marked as Exhibit "A".
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> 6. Your Petitioner has, pursuant to Section 218 of the Act, on the 20th of October, 1998 left a notice of demand dated the 14th day of October, 1998 ("the Notice") at the registered office of the Company, demanding the Indebtedness from the Company. A copy of the said Notice is annexed herewith and marked as Exhibit "B". A copy of a statutory declaration by Jeeva s/o Murugiah declared on 22.10.1998 with respect to the due service of the Notice is annexed herewith marked as Exhibit "C".
>
> 7. Over twenty-one (21) days has lapsed since the Notice has been left as aforesaid, but the Company has failed, refused and/or neglected to pay the Indebtedness nor has it secured or compounded the indebtedness to the satisfaction of Your Petitioner.
>
> 8. The Company is therefore insolvent and unable to pay its debts.
>
> 9. In the circumstances, it is just and equitable that the Company is wound up.

The respondent's affidavit verifying the petition and which was sworn by the liquidator, one Lim Tin Huat, consisted of 2 paragraphs and it reads:

> 1. I am the Liquidator of the Petitioner and am duly authorised by the Petitioner, a company duly incorporated under the Companies Act, 1965 to affirm this Affidavit for and on its behalf.

> 2. Such of the statements in the Petition now produced and shown to me marked as Exhibit "A" as relating to the acts and deeds of the said Petitioner are true and such of the statements as relate to the acts and deeds of any other person or person I believe to be true.

In its affidavit in opposition, sworn by a director of the appellant, one Mohd Zaki bin Mohd Noor the appellant disputed all the matters stated in the petition and the affidavit verifying the petition and denied being indebted to the respondent. The appellant contended therein, *inter alia*, the following:

(i) the respondent, from the outset, encountered difficulties in carrying out the works and the appellant assisted by financial means and made direct payments to other contractors to do part of the works;

(ii) the respondent had ceased to do the works and a subcontractor, known as Tradeworks Construction & Trading ("TCT"), with the appellant's consent had carried out the works and was paid directly by the appellant;

(iii) the appellant was unaware that the respondent was wound up on 20 January 1997 and even up to 1 July 1997 when the respondent requested in writing that 10% of the progress claims be paid to its goodself whilst 90% be paid to TCT;

(iv) on 22 July 1997 the appellant's solicitors, upon making a search, confirmed that the respondent has been wound up and that the official receiver was appointed provisional liquidator.

It is the stand of the appellant that as the works in question were done by other contractors who have been paid and the fact that the respondent had abandoned the works and was wound up, there is no debt due to the respondent from the appellant. The appellant further contended that upon receiving the respondent's notice issued pursuant to s. 218 of the Companies Act 1965 ("the Act"), its solicitors had replied by letter refuting any debt. That letter, *inter alia*, reads:

> TAKE NOTICE that our client Syarikat Mohd Noor Yusof Sdn Bhd, a solvent company, hereby disputes the claim or debt owing to your client. Please confirm WITHIN SEVEN (7) DAYS from the receipt of this notice that your goodoffice will not be proceeding with Winding-up action against our client failing which we will take necessary steps to protect our client's interest.

> Our client disputes the claim and will take all steps to defend themselves if necessary. If your clients insist in proceeding with Winding-up action against our client, our client will hold your clients responsible for any damages or losses due to your client's action.

The appellant pointed out that the respondent did not respond or made any attempt to verify the matter. The appellant's affidavit, *inter alia*, reads as follows:

> 8. The certifying officer has all along been issuing certificates for payment with reference to the Petitioner, being unaware that the Petitioner has been wound up as at 20th January 1997 and had not done any work.
>
> 9. Essentially, the Petitioner is claiming on certificates for work done by others for which others have been paid, and long after it had abandoned the works.
>
> 10. I am advised by the Respondent's Solicitors and verily believe that the Petitioner does not have any bona fide debt due to it from the Respondent, and it is not a fit and proper case to found a basis for a winding up without a valid judgment.
>
> 11. I respectfully inform the Court that the Respondent has suffered grievous damage financially and to its credit and reputation in that its Bankers Malayan Banking Berhad have frozen its accounts, as a result of this Petition being presented.

The appellant then prayed that the petition be dismissed with costs.

The respondent filed an affidavit in reply and contended, *inter alia*, the following:

(i) that it never encountered difficulties in carrying out its obligations as the main sub-contractor;

(ii) that it never sought financial assistance from the appellant and neither has the appellant assisted through financial means;

(iii) it was the respondent which provided financial assistance to the appellant;

(iv) that the payments made directly to the sub-contractors appointed by the respondent was due to the request made by the sub-contractors and agreed upon by the appellant;

(v) that the payments made by the appellant to the sub-contractors forms part of the appellant's payment due under the said contracts and the respondent has an absolute right to assign the payment due to it to any nominated recipient if its wishes to do so and it does not in any way imply that the appellant is providing financial assistance to the respondent;

(vi) TCT was the respondent's nominated sub-contractor to carry out part of the works; the respondent's request to pay TCT 90% of the claim under progress payment no. 29 was as a result of the request made by TCT for direct payment from the appellant;

(vii) the certifying officer knew that the respondent has been wound up and had carried out the works and as such had certified the payment to the respondent which was agreed by the appellant.

The matter was heard on 16 October 1999. The learned judge found that the monies demanded were still due and owing to the respondent by the appellant and hence ordered that the appellant be wound up.

In his grounds of decision the learned judge said:

> 7. From the evidence adduced as contained in the various affidavits filed by the parties, it left the Court with 2 issues to be resolved in determining this petition of the Petitioner. They are:
>
> (1) whether the Respondent is at all indebted to the Petitioner in the sum stipulated in the petition as the amount is said to have been paid with the consent of the Petitioner to third parties.
>
> (2) whether this petition of the Petitioner is premature pending a reference to the arbitrator.

In relation to the first issue, the learned judge said as follows:

> The following are the details of the amount of claim which form the basis of the debts extracted from the copies of the certificates in the aforesaid exhibit "A" to the petition:

Progress Payment Certificate No.	Dated	Amount
(a) 31 10th	Nov 97	RM195,600.00
(b) 32 13th	Nov 97	RM142,485.00
(c) 33 20th	Nov 97	RM129,320.00
	Total:	RM467,405.00

and the Certificate for Final Payment dated 15th October 1997 amounting to RM428,973.18, making a grand total of RM896,378.18. All the said amount was duly certified by MIS Architect and so approved by the Respondent in favour of the Petitioner.

The learned judge was satisfied that the amount of debt as stated in the petition "had not been established to have been paid by respondent to the petitioner".

On the second issue the learned judge said:

9. Coming now to the last issue concerning the resolution of the dispute by the arbitrator. The contract agreements entered into between the Petitioner and the Respondent provide the normal arbitration referral in the event of any dispute or difference arising between them. But does it mean that the mere presence of the arbitration clause in an agreement would hinder a party from bringing in a petition for a winding up of the other party based on a debt properly established? Another factor to consider is the steps taken by either or both of the parties in trying to implement the arbitration clause. In this case, there is no evidence that any step at all is being taken by the Respondent in particular, in wanting to bring its dispute to the arbitration apart from using the clause as a shield to prevent the Petitioner from exercising its right under the Companies Act in getting the Respondent to be wound up for failure to pay its debts within the statutory period. The evidence of debts is exhibit "A" to the petition duly certified by the architect and approved by the Respondent. The Respondent had failed to settle the debts within the statutory period prescribed. Among the certificates in exhibit "A" is one appearing on page 15 thereof wherein the Respondent had taken the liberty to deduct from the total amount due, a certain proportion of it to be allocated to a third party. If the contention of the Respondent that some parts of the debts in respect of other certificates are due to any third party is correct, it is expected that a similar allocation would have been done in the respective certificates. But this was not done so. Thus, in reality there is no dispute whatsoever as regards the debts established by the relevant certificates as being due from the Respondent to the Petitioner duly approved by the Respondent. If at all there is any, it would have been a dispute between the Respondent and the architect. In the circumstances, the issue has no merit at all.

We noted that cl. 51(b)(iii) of the first contract which relate to the construction of shop-houses provides, *inter alia*, if the respondent "being a company is having a winding up order made against him", the appellant may by a notice sent by registered post determine the employment of the respondent. Further, cl. 54 of the first contract provides if any dispute shall arise between the parties during the progress or after the completion of the works, such dispute or difference shall be referred to the Superintending Officer ("S.O"), *viz.*, Messrs MIS Architects for a decision. If the decision is not forthcoming within 45 days or if the appellant is dissatisfied with the decision, the appellant may subsequently refer the dispute or difference to arbitration.

We also noted that the second contract which relate to the construction of terrace-houses provides, *inter alia*, in the event that the respondent has a winding up order made against it, its employment "shall be forthwith automatically determined but the said employment may be reinstated and continued" if the appellant and the liquidator shall so agree. We further noted that it is also provided therein in the event that any dispute or difference should arise between the parties either during the progress or after the abandonment of the works as to any matter or thing of whatsoever arising thereunder or in connection therewith, then such dispute shall be referred to arbitration.

The respondent disputed the contention of the appellant that it was not aware that there was a winding up order made against the respondent on 20 January 1997. On perusing the documents available in the appeal record, we noted that by letter addressed to the appellant (p. 83 of the appeal record) and dated 1 July 1997, ie, after the winding up order has been made against the respondent, the respondent's letter-head did not convey the message that it was in liquidation. We are of the view that this would be contrary to s. 283 of the Act. That section, entitled "Notification that a company is in liquidation" reads:

> (1) Where a company is being wound up every invoice, order for goods or business letter issued by or on behalf of the company or a liquidator of the company or a receiver or manager of the property of the company, being a document on or in which the name of the company appears, shall have the words "in liquidation" added after the name of the company where it first appears therein.
>
> (2) If default is made in complying with this section the company, and every officer of the company or liquidator and every receiver or manager who knowingly and wilfully authorizes or permits the default, shall be guilty of an offence against this Act.
>
> Penalty: Five hundred ringgit.

Thus, it would seem that the respondent and or the liquidator has committed an offence when it failed to have the words "in liquidation" added after the name of the respondent in the said letter.

Be that as it may, it is not disputed that the respondent's solicitors caused to be delivered a notice pursuant to s. 218(2)(a) of the Act to the appellant at its registered office. In the said notice, the appellant was required to pay the said sum of RM896,378.18 within 21 days of receipt of the notice. It was also stated therein "that the consequence of not complying with the requisition of this notice is that winding-up proceedings may be taken against you". The appellant replied it was disputing the debt.

It is the respondent's stand that since the appellant has failed, refused and/or neglected to pay the indebtedness nor has it secured or compounded the indebtedness, appellant is therefore insolvent and unable to pay its debts and in the circumstances it is just and equitable that the appellant be wound up.

Section 218 of the Act which is entitled "Circumstances in which a company may be wound up by Court", *inter alia*, reads:

(1) The court may order the winding up if:

(e) the company is unable to pay its debts;

Definition of inability to pay debts.

(2) A company shall be deemed to be unable to pay its debts if:

(a) a creditor by assignment or otherwise to whom the company is indebted in a sum exceeding five hundred ringgit then due has served on the company by leaving at the registered office a demand under his hand or under the hand of his agent thereunto lawfully authorized requiring the company to pay the sum so due, and the company has for three weeks thereafter neglected to pay the sum or to secure or compound for it to the reasonable satisfaction of the creditor;

(b) execution or other process issued on a judgment, decree or order of any court in favour of a creditor of the company is returned unsatisfied in whole or in part; or

(c) it is proved to the satisfaction of the Court that the company is unable to pay its debts; and in determining whether a company is unable to pay its debts the Court shall take into account the contingent and prospective liabilities of the company.

We noted that the respondent has not obtained a judgment against the appellant for the sum claimed as being due to them. The alleged debt is clearly disputed by the appellant. Section 218(1) of the Act provides, *inter alia*, the court may order the winding up if the company is unable to pay its debts. This would seem to be the only ground relied upon by the respondent. The respondent had sent a notice under s. 218(2)(a) of the Act to the appellant demanding the total sum due amounting to RM896,378.18 for progress payments No. 31 dated 10 November 1997, No. 32 dated 13 November 1997 and No. 33 dated 20 November 1997 and a certificate of final payment dated 15 October 1997 in respect of the said contracts. The appellant's solicitors replied, *inter alia*, as follows:

> TAKE NOTICE that our client Syarikat Mohd Noor Yusof Sdn Bhd, a solvent company, hereby disputes the claim or debt owing to your client. Please confirm WITHIN SEVEN (7) DAYS from the receipt of this notice that your good office will not be proceeding with Winding-up action against our client failing which we take the necessary steps to protect our client's interest.
>
> Our client disputes the claim and will take all steps to defend themselves if necessary. If your clients insist in proceeding with Winding-up action against our client, our client will hold your clients responsible for any damages or losses due to your client's action.

In *Jurupakat Sdn Bhd v. Kumpulan Good Earth (1973) Sdn Bhd* [1988] 1 CLJ 649; [1988] 1 CLJ (Rep) 618, the petitioner, a building contractor filed a petition to wind up the respondent, a housing developer as the latter failed to pay for the balance of the work that the petitioner had carried out for the respondent under an agreement together with interest. The respondent applied for an order to strike out the petition pursuant to O. 18 r. 19 of the Rules of the High Court 1980 and under the inherent jurisdiction of the court. In allowing the application, Zakaria Yatim J (as he then was) said:

> It is common ground that there is no judgment debt in the present case. The question for the court to consider is whether the petitioner is a creditor and the respondent is a debtor. A creditor is a person who could enforce his claim against the company by an action of debt and a person cannot petition as a creditor when he merely has a right of action against the company for unliquidated damages for breach of contract (see *Pennington's Company Law* (1985) 5th Ed p 843). Where a petition is based on a debt which is disputed on substantial grounds, the petitioner is not a creditor (see *Re Lympne Investment Ltd* at p 389). If the petitioner is not a creditor, it is not entitled to present a petition or apply for a winding-up order. It has no *locus standi* and the petition must fail (see *Mann & Another v. Goldstein & Another* at p 771).

We are aware that it is not provided under the Act that a petitioner must be armed with a judgment debt prior to the filing of a petition to wind up a company. In the matter before us, there is no judgment debt and the debt claimed is disputed. We are of the view that a notice of indebtedness issued under s. 218 of the Act is not evidence of the debt.

The facts showed that the appellant's paid-up capital is RM8,395,902. The respondent must substantiate its claim that the appellant is unable to pay its debts. The presumption that the appellant is unable to pay its debts cannot arise under the above circumstances as the appellant seems to be solvent. The indebtedness is clearly disputed and the sum referred to in the respondent's notice issued under s. 218(2) is not a judgment sum. In our view, that notice

is nothing more than a letter of demand sent by the respondent's solicitors the purpose of which is to invoke the presumption of inability to pay debts. The respondent would still have to prove that it is a creditor and that the sum so stated in the notice is owing and so due. In *Sri Hartamas Development Sdn Bhd v. MBF Finance Bhd* [1992] 1 CLJ 637; [1992] 1 CLJ (Rep) 303 the court held the function of such a notice is to warn the debtor of an impending petition. The notice must also relate to a specified debt whose amount or existence cannot be seriously questioned. Where the amount is questionable or suspect and there is no judgment sum to support it, the petition should be dismissed. In *In re Ban Hong Co Ltd* [1959] MLJ 100 it was held that a petition instituted for the purpose of enforcing a disputed debt is an abuse of process of the court and will be dismissed with costs. Rigby J said (at p. 103):

> It is well settled law that a winding-up petition is not to be used as machinery to try a common law action, and that the presentation of a petition for winding-up simply with a view to enforcing payment of a disputed debt is an abuse of the process of the Court and should be dismissed with costs.

We are of the view that this is not a proper case to grant an order of winding up. One of the issues which need to be determined is whether it was the respondent and not other sub-contractors which completed the works and consequently whether the appellant paid directly to the respondent or to the sub-contractors for work done. We find that the respondent has not exhausted all remedies available to them as provided for under the said contracts. The dispute should be referred to the superintending officer or to arbitration as the case may be as provided for under the said contracts. There is nothing to prevent the respondent from filing a writ against the appellant if everything else fails. We would agree with the views of Rigby J expressed in *In re Ban Hong Co Ltd, supra.* A winding up petition is not a legitimate means of seeking to enforce payment of a debt which is disputed.

We are of the view that the learned judge in the court below was wrong in granting the order for the winding up of the appellant and as such we allowed this appeal with costs, set aside the order of winding up granted against the appellant on 16 October 1999 and ordered that the deposit be refunded to the appellant.